

EXHIBIT I

KOBAYASHI, SUGITA & GODA

LEX R. SMITH 3485-0

THOMAS H. YEE 7344-0

First Hawaiian Center

999 Bishop Street, Suite 2600

Honolulu, Hawaii 96813

Telephone No. (808) 539-8700

Facsimile No. (808) 539-8799

Email: lrs@ksglaw.com

KIRKLAND & ELLIS LLP

Michael E. Baumann (CA Bar No. 145830)

Damian D. Capozzola (CA Bar No. 186412)

R. Olivia Samad (CA Bar No. 228611)

777 South Figueroa Street

Los Angeles, CA 90017

Telephone No. (213) 680-8400

Facsimile No. (213) 680-8500

Email: mbaumann@kirkland.com

Attorneys for Defendant

POST-CONFIRMATION TRUST

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;

Plaintiff,

vs.

HAWAIIAN EXPRESS SERVICE,

(Caption Continued)

) CIVIL NO. CV03-00385 SOM-LEK

) (Copyright)

) **DECLARATION OF DAMIAN D.**

) **CAPOZZOLA IN SUPPORT OF**

) **DEFENDANT PCT'S MOTION FOR**

) **ATTORNEYS' FEES AND COSTS**

) Judge:

Hon. Susan O. Mollway

INC., et al.,)
)
)
Defendants.)
_____)

**DECLARATION OF DAMIAN D. CAPOZZOLA IN SUPPORT OF
DEFENDANT PCT'S MOTION FOR ATTORNEYS' FEES AND COSTS**

I, DAMIAN D. CAPOZZOLA, declare that:

1. I am a partner at Kirkland & Ellis, LLP, and one of the attorneys representing the Defendant Fleming (now the Post Confirmation Trust ("PCT")) in this case. I am licensed to practice law in the State of California (SBN 186412) and have been admitted pro hac vice in this case.

2. I have been engaged in the practice of law continuously since 1996. My billing rate during the timeframe of this matter has ranged from \$410.00 to \$515.00.

3. I make this declaration based on my personal knowledge and belief. I know the following to be true through my work on this case. If called upon to do so I could and would competently testify as follows.

4. Attached as Exhibit "A" is a true and correct copy of an e-mail from Tim Hogan to Damian Capozzola dated April 21, 2004 [Ex. 9 to the 7/1/04 Berry Deposition].

5. Attached as Exhibit "B" is a true and correct copy of Wayne Berry's first Administrative Claim dated June 9, 2004.

6. Attached as Exhibit "C" is a true and correct copy of Thomas Ueno's expert report dated March 21, 2005.

7. Attached as Exhibit "D" is a true and correct copy of Berry's July 3, 2001 complaint against Fleming.

8. Attached as Exhibit "E" is a true and correct copy of Special Verdict Form dated March 06, 2003.

9. Attached as Exhibit "F" is a true and correct copy of Order Granting in Part, Denying in Part Berry's Motion for Summary Judgment dated June 27, 2005.

10. Attached as Exhibit "G" is a true and correct copy of Berry's Original Complaint in this matter.

11. Attached as Exhibit "H" is a true and correct copy of Berry's First Amended Complaint in this matter.

12. Attached as Exhibit "I" is a true and correct copy of Order Denying Plaintiff Wayne Berry's Motion for Preliminary Injunction dated Oct. 08, 2004.

13. Attached as Exhibit "J" is a true and correct copy of excerpts from Fleming Asset Purchase Agreement dated July 07, 2003.

14. Attached as Exhibit "K" is a true and correct copy of a February 9, 2004 letter from Tim Hogan offering to settle for \$400,000.

15. Attached as Exhibit "L" and Exhibit "M" are excerpts from deposition

transcripts from the depositions of Scott Stevens and Michael Anderson.

16. Attached as Exhibit "N" are excerpts from the July 26, 2004 transcript of the Fleming confirmation hearing.

17. Attached as Exhibit "O" is a true and correct copy of excerpts from W. Berry Deposition Transcript dated May 19, 2005.

18. Attached as Exhibit "P" is a true and correct copy of E-mail from T. Hogan to D. Capozzola dated July 15, 2003.

19. Attached as Exhibit "Q" is a true and correct copy of Plaintiff W. Berry's Submission of Redrafted Proposed Second Amended Verified Complaint dated Feb. 23, 2004.

20. Attached as Exhibit "R" is a true and correct copy of excerpts from W. Berry Deposition Transcript dated Feb. 05, 2003.

21. Attached as Exhibit "S" is a true and correct copy of Plaintiff W. Berry's RICO Statement dated June 18, 2004.

22. Attached as Exhibit "T" are true and correct excerpts from Plaintiff W. Berry's Memorandum in Opposition to Hawaii Transfer Co., Ltd.'s Motion for Summary Judgment dated Dec. 20, 2004.

23. Attached as Exhibit "U" is a true and correct copy of Berry's Second Amended Verified Complaint dated June 18, 2004.

24. Attached as Exhibit "V" are a summary sheet and backup showing the

PCT's \$296,624.57 in expert fees for Jeff Kinrich and Dr. Martin Walker.

25. Attached as Exhibit "W" are a summary sheet and backup showing the PCT's \$19,392.38 in deposition transcript and video costs.

26. Attached as Exhibit "X" are a summary sheet and backup showing the PCT's \$11,556.53 in expenses for hearing transcripts.

27. Attached as Exhibit "Y" are a summary sheet and backup showing the PCT's expenses of \$2,178.08 in outside costs for exhibits and printing / copying.

28. Attached as Exhibit "Z" are a summary sheet and backup showing \$5,466.39 in expenses for trial attendance and participation of Samantha Benson, executive assistant to the PCT's lead counsel, Michael Baumann.

29. Attached as Exhibit "AA" are a summary sheet and backup showing \$5,605.17 in expenses incurred throughout this case by Olivia Samad. See also Exhibit "VV" for an additional \$4,485.82 in expenses for Olivia Samad, bringing her total expenses to \$10,090.99.

30. Attached as Exhibit "BB" are a summary sheet and backup showing \$16,960.11 in expenses incurred throughout this case by Eric Liebler.

31. Attached as Exhibit "CC" are a summary sheet and backup showing \$19,931.16 in expenses incurred throughout this case by Damian Capozzola.

32. Attached as Exhibit "DD" are a summary sheet and backup showing \$2,927.59 in expenses incurred throughout this case by Melissa Dulac.

33. Attached as Exhibit "EE" are a summary sheet and backup showing \$6,649.27 in expenses incurred throughout this case by Michael Baumann.

34. Attached as Exhibit "FF" are biographies (in alphabetical order) for all K&E personnel who billed time to this matter that the PCT is claiming. These resumes describe the relevant qualifications and experience of the various K&E personnel. Eric Liebler, Damian Capozzola, Melissa Dulac, and Olivia Samad were the primary litigation attorneys on the matter and jointly handled all aspects of the case including pleadings, written discovery and deposition practice, motions, and trial preparation. Michael Baumann substituted in as lead trial counsel when Eric Liebler left Kirkland & Ellis for other employment in February, 2006. Richard Wynne was the lead bankruptcy attorney for Fleming and the PCT, and he provided general oversight and comments on strategy with regard to handling Berry's efforts to leverage the bankruptcy proceedings against his lawsuit in Hawaii and vice versa. Geoff Richards, Shirley Cho, and Erin Brady are bankruptcy attorneys who similarly provided such bankruptcy insights from time to time. Jeffrey Norman, Karen Schweikert, Dawn Dawson, Michael Fatall, and Peter Spingola are intellectual property attorneys who gave occasional advice on specific copyright issues from time to time. Greer Shaw, Glen Mastroberte, and Russell Archer are litigation attorneys who helped out with discrete projects on certain not requiring deep institutional knowledge of the case when other team

members were not available. Kamran Salour is a law clerk who also helped out in that manner. Allison Andrews, Ed Yep, Antoinette Huerta, Ray Roman, and Neal San Diego served as legal assistants, responsible for file maintenance, developing our internal working database of documents and images, preparing exhibits and assisting with filings, and otherwise serving in a standard litigation support role.

35. Attached as Exhibit "GG" is an e-mail from Timothy Hogan to Thomas Ueno and Wayne Berry dated June 29, 2005 in which Mr. Hogan concedes that the Court's June 27, 2005 Order "killed a lot of our case."

36. Attached as Exhibit "HH" is a true and correct copy of plaintiff's trial exhibit 90.

37. Attached as Exhibit "II" is a true and correct copy of the March 7, 2006 jury verdict in this matter.

38. Attached as Exhibit "JJ" is a true and correct copy of page 3 from the memorandum in support of Wayne Berry's concurrent motion for attorneys' fees.

39. Attached as Exhibit "KK" and "LL" are excerpts from the orders of this Court denying Berry injunctive relief dated October 8, 2004 and March 9, 2006.

40. Attached as Exhibit "MM" is a true and correct copy of a June 21, 2002 letter from Timothy Hogan.

41. Attached as Exhibit "NN" is a spreadsheet summarizing the time

spent on this matter by Kirkland & Ellis billable counsel (as well as legal assistants and research staff), sorted by the categories delineated in the District of Hawaii Local Rules (Rule 54.3(d)(1)), with subtotals by category.

42. Attached as Exhibit "OO" is a spreadsheet summarizing the time spent on this matter by Kirkland & Ellis billable counsel (as well as legal assistants and research staff), sorted by counsel, with subtotals by counsel or staff member.

43. Attached as Exhibit "PP" is a spreadsheet summarizing the time spent on this matter by Kirkland & Ellis billable counsel (as well as legal assistants and research staff), sorted by date.

44. Attached as Exhibit "QQ" is a spreadsheet summarizing reductions made to time entries that required me to exercise "billing judgment" in reducing them because they were not on their face entirely attributable to this matter. In exercising this judgment I considered how many other matters appeared in the time description as well as my general recollection of what was happening in the case as of the date of the entry, and I made conservative estimates (i.e., favorable to Berry). The descriptions listed do not include irrelevant matters that comprised part of the original entries; only portions relevant to Berry have been included.

45. The fees listed in the spreadsheets contained in Exhibits NN-QQ are the attorneys' and staff members' customary fees for like work, and are the customary fees for like work prevailing in the communities in which the attorneys

and staff members practice.

46. Attached as Exhibit "RR" is a true and correct copy of a letter dated July 13, 2004 from Richard Wynne to Timothy Hogan.

47. Attached as Exhibit "SS" is a true and correct copy of a letter dated July 14, 2004 from Timothy Hogan to Richard Wynne.

48. Attached as Exhibit "TT" is a spreadsheet showing \$65,391.42 in additional "soft costs" necessarily and reasonably incurred on which no additional backup is available.

49. Attached as Exhibit "UU" is a spreadsheet developed by my staff at my direction and under my supervision showing \$212.30 in costs for copying 2123 pages (at K&E's reasonable and standard rate of \$0.10 per page) that were used as exhibits to motions (one set of pages for each motion).

50. Attached as Exhibit "VV" is an expense report for Olivia Samad that was not completed in time to be captured in Exhibit "AA."

51. Exhibit "WW" is reserved.

52. Attached as Exhibit "XX" is an overall summary of K&E's fees and costs.

53. Exhibit "YY" contains true and correct copies of backup for Kirkland & Ellis' fees for attorneys and staff claimed by the PCT. Items concerning July, 2004 through October, 2004 were drawn from bills also covering numerous

unrelated matters. They have been edited by K&E staff to exclude matters unrelated to Berry and only retain entries germane to this analysis. Redacted versions of the source materials can be made available upon request.

54. I have reviewed and approved the time and charges set forth in the itemizations of work performed contained in the Exhibits to this Declaration, and the time spent and expenses incurred were reasonable and necessary under the circumstances.

55. The fees, costs, and expenses claimed in this Declaration and the Motion it supports to the best of my knowledge after diligent inquiry are correctly stated, were necessarily incurred, are reasonable, and are allowable by law. Counsel have met and conferred, or (in light of plaintiff's own request for costs and the schedule established by Magistrate Kobayashi) prior to the settlement conference or hearing on this matter will meet and confer, in an effort to resolve any disputed about the claimed costs and will report to the Court as appropriate.

I declare under penalty of perjury that the statements made herein are true and correct to the best of my knowledge, information and belief in Los Angeles, California, on March 23, 2006.



Damian D. Capozzola

EXHIBIT A



hogant001@hawaii.rr.com
04/21/2004 12:27 PM

To Damian Capozzola/Los Angeles/Kirkland-Ellis@K&E
cc "wayneberry@hotmail.com" <wayneberry@hotmail.com>
bcc
Subject Berry Admin. Claim

April 21, 2004

Dear Mr. Capozzola:

Re: Berry Admin. Claim.

We are about to file Mr. Berry's admin claim for post-petition infringement charges incurred to date. We will reserve his right to add to this figure in the future until the infringement ceases. We are going to be relying on the information that Fleming has provided in the Bankruptcy case to arrive at the total number of containers that are shipped through his system.

As you may be aware, Mr. Berry presently charges \$115 per ocean container shipped through his system. Based on the information Fleming disclosed in the Bankruptcy, its total number of containers shipped is no less than 400 per week or 20800 annually. We believe this number is actually shy one hundred containers a week.

Based on that figure we arrive at a per diem container count of 56,9863 containers per day. That makes a unpaid license fee of \$6,553,4245 per day that Mr. Berry is entitled to as actual damages under Section 504(a)(1). There have been 388 days since the commencement of the case on April 1st last year, that makes \$2,542,728.70 accrued administrative claim for unpaid license fee to date.

Mr. Berry also claims the infringer's profit for that unlicensed use under Section 504(a)(1) and (b). Based on his business records that profit is \$1,763 per container. That is \$100,466.84 per diem. Based on the 388 days, that equals another \$38,981,133 accrued to date. Minus the \$1,000,000 in overhead (that Fleming doesn't have to pay because that is being paid by C&S) and minus the licensing fee (to avoid duplicating damages) the total claim is \$35,438,405 as of today.

We know how important it is to Fleming, its creditors and the Court to have these figures to adequately review the plan's feasibility so we will work to have it filed and served on the notice parties in advance of May 4, 2004.

If Fleming disputes the underlying factual basis (i.e. container counts, profits and overhead) we recommend that we begin discovery immediately to resolve these narrow issues. We can do it all in the Hawaii litigation unless you are comfortable with our numbers.


I know these numbers may seem a bit high, but in light of the recent trend to saddle 12 year-olds with thousands of dollars of infringement penalties for downloading some songs, they seem proportionate from an equitable perspective especially when applied to willful infringement by a large company done for financial gain measured in the hundreds of millions of dollars.

If you have any questions or concerns please feel free to call me.

/s/Tim Hogan

Exhibit 9
Berry
Date 4-1-04
C.P.

EXHIBIT B

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE		ADMINISTRATIVE CLAIM
In re Fleming Companies, Inc., et al. Debtors	Chapter 11, Case Number Case No 03-10945 (MFW) (Jointly Administrated)	
NOTE: This form should only be used to make a claim for an administrative expense arising on or after April 1, 2003 through and including October 31, 2003. IT SHOULD NOT BE USED FOR CLAIMS ARISING PRIOR TO APRIL 1, 2003.		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach a copy of statement given particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if this address differs from the address on the envelope sent to you by the court.
Name of Creditor and Address Wayne Berry Post Office Box 3727 Honolulu, Hawaii 96813-3727		
Creditor Telephone Number (808) 387-3881		
CREDITOR TAX ID #	ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR Federal Express Tracking Number 831387645600	Check here if this claim <input type="checkbox"/> replaces or <input type="checkbox"/> amends a previously filed claim dated _____
1 BASIS FOR ADMINISTRATIVE CLAIM <input type="checkbox"/> Goods sold <input type="checkbox"/> Personal injury/wrongful death/property damage <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Services performed <input type="checkbox"/> Taxes <input type="checkbox"/> Wages, salaries, and compensation (Fill out below) <input type="checkbox"/> Money loaned <input checked="" type="checkbox"/> Other (describe briefly) Your social security number _____ <input type="checkbox"/> Contractual or lease obligations Unpaid compensation for services performed from _____ to _____ Fleming's unauthorized sale of Berry's Freight Control System software to C&S Voluminous documents - available on request (date) (date)		
2 DATE DEBT WAS INCURRED SEE FOOTNOTE # 1 - BELOW		3 IF COURT JUDGMENT, DATE OBTAINED
4 TOTAL AMOUNT OF ADMINISTRATIVE CLAIM		\$ 48 Million (Forty Eight Million Dollars) (Total)
If all or part of your claim is secured, also complete Item 5 below		
<input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5 SECURED CLAIM <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of set off). Brief description of collateral _____ <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Equipment <input type="checkbox"/> Other _____ Value of collateral \$ _____		7 Offsets, Credits and Setoffs <input type="checkbox"/> All payments made on this claim by the Debtors have been credited and deducted from the amount claimed herein. <input type="checkbox"/> This claim is not subject to any setoff or counterclaim. <input type="checkbox"/> This claim is subject to setoff or counterclaim as follows: _____
6 Please identify the Debtor against whom your claim is asserted† <u>Fleming Companies, Inc</u>		8 This Administrative Proof of Claim <input checked="" type="checkbox"/> is the first filed proof of claim evidencing the claim asserted herein. <input type="checkbox"/> amends/supplements a proof of claim filed on _____, or <input type="checkbox"/> replaces/suspends a proof of claim filed on _____.
9 Assignment <input type="checkbox"/> If the claimant has obtained this claim by Assignment, a copy is attached hereto. DATE SIGNED June 7, 2004		THIS SPACE FOR COURT USE ONLY <div style="text-align: center;"> FILED JUN 09 2004 BMC </div>
SIGN and print the name and title, if any, of the creditor or other person authorized to file this claim (attach power of attorney, if any) <div style="text-align: center;">  Wayne Berry </div>		

Penalty for presenting fraudulent claim is a fine of up to \$500,000 or imprisonment for up to 5 years, or both 18 U.S.C. §§ 152 and 3571

† Please refer to instructions on reverse side for a complete list of debtors.

FOOTNOTE 1 According to Fleming disclosures (made after the First Admin Bar Date) sometime on or after July 7, 2003

Fleming Companies Claim



10428

INSTRUCTIONS FOR FILING PROOF OF ADMINISTRATIVE CLAIM

- 1 Please read this proof of administrative claim form carefully and fill it in completely and accurately
- 2 Print legibly Your claim may be disallowed if it cannot be read and understood
- 3 The proof of claim must be completed in English The amount of any claims identified on the form must be as of October 31 2003, and must be denominated in United States currency
- 4 Attach additional pages if more space is required to complete this proof of administrative claim form
- 5 **THIS FORM SHOULD ONLY BE USED TO MAKE A CLAIM FOR AN ADMINISTRATIVE EXPENSE, AS DEFINED IN 11 U.S.C. § 503, THAT WAS INCURRED ON OR AFTER APRIL 1, 2003 THROUGH OCTOBER 31, 2003 THIS FORM IS NOT FOR FILING CLAIMS ARISING PRIOR TO APRIL 1, 2003**
- 6 This proof of claim form should be sent by messenger, or overnight courier to

For Overnight Mail or Hand Delivery
 Bankruptcy Management Corp ("BMC")
 1330 E Franklin Ave
 El Segundo, CA 90245

For Regular Mail
 Bankruptcy Management Corp ("BMC")
 P O Box 900
 El Segundo, CA 90245-0900

BMC is not permitted to accept claims sent by facsimile, telecopy or other electronic submission

- 7 To obtain verification that your proof of claim was received by BMC, include a copy of the completed form and a self-addressed postage prepaid return envelope when you file this form with BMC
- 8 **THE CLAIMANT MUST ATTACH COPIES OF ANY AND ALL SUPPORTING DOCUMENTS THAT PROVE THAT THIS CLAIM IS FOR AN OBLIGATION INCURRED ON OR AFTER APRIL 1, 2003 THROUGH AND INCLUDING OCTOBER 31, 2003, SUCH AS PROMISSORY NOTES, PURCHASE ORDERS, INVOICES, ITEMIZED STATEMENTS OF ACCOUNTS, CONTRACTS, COURT JUDGMENTS, OR EVIDENCE OF A SECURITY INTEREST IF THE DOCUMENTS ARE NOT ATTACHED, THE DEBTOR MAY SEEK DISALLOWANCE OF YOUR CLAIM.**
- 9 To be considered timely filed, the proof of claim form must be actually received by BMC by January 15, 2004, at 4 00 p.m. Eastern Standard Time and must include appropriate materials establishing THE ADMINISTRATIVE NATURE OF THE CLAIM and the amount of the asserted claim

Name and case number of the Debtor Entity

Fleming Companies, Inc (03-10945)	Fleming Transportation Service, Inc (03-10945)
Core-Mark International, Inc (03-10945)	Food 4 Less Beverage Company, Inc (03-10945)
ABCO Food Group, Inc (03-10945)	Fuelserv, Inc (03-10945)
ABCO Markets, Inc (03-10945)	General Acceptance Corporation (03-10945)
ABCO Realty Corp (03-10945)	Head Distributing Company (03-10945)
ASI Office Automation, Inc (03-10945)	Marquise Ventures Company, Inc (03-10945)
C/M Products, Inc (03-10945)	Minter-Weisman Co (03-10945)
Core-Mark Interrelated Companies, Inc (03-10945)	Piggly Wiggly Company (03-10945)
Core-Mark Mid-Continent, Inc (03-10945)	Progressive Realty Inc (03-10945)
Dunagan Fuels Inc (03-10945)	Rainbow Food Group, Inc (03-10945)
Favar Concepts, Ltd (03-10945)	Retail Investments, Inc (03-10945)
Fleming Foods Management Co L.L.C (03-10945)	Retail Supermarkets Inc (03-10945)
Fleming Foods of Texas, L.P. (03-10945)	RFS Marketing Services, Inc (03-10945)
Fleming International, Ltd (03-10945)	Richmar Foods, Inc (03-10945)
Fleming Supermarkets of Florida, Inc (03-10945)	

See other side for Proof of Administrative Claim Form

EXHIBIT C

Thomas T. Ueno, CPA

844 Queen Street
Honolulu, Hawaii 96813

Fax 808 591-0813
808 591-0441
E-mail tueno@hawaii.rr.com

March 21, 2005

Timothy Hogan, Esquire
Lynch Ichida Thompson & Kim
First Hawaiian Tower
1132 Bishop Street, Suite 1405
Honolulu, HI 96813

RE: Fleming Matter

OPINIONS

My opinions as of this date on matters relevant to this case and the basis and reasons for those opinions are described in Attachment A. Our work is continuing in this matter; you have informed me that additional information may become available. I reserve the right to update my opinions as this additional information becomes available.

INFORMATION CONSIDERED

In preparing this report and forming the opinions expressed in Attachment A, I have considered the items of information disclosed in Attachment A-1. I have also considered my knowledge, training and professional experience as a professional accountant.

QUALIFICATIONS

A summary of my qualifications is presented in Attachment B.

COMPENSATION

Thomas Ueno is being compensated at our normal hourly rate for this type of work of \$265 per hour to \$325 per hour for deposition/testimony; manager at \$205 per hour; and professional staff at \$175 to \$185 per hour. Our compensation is not contingent on the outcome of this litigation.

OTHER TESTIMONY

The cases in which Thomas T Ueno CPA has testified as an expert at trial or by deposition within the preceding four years are listed in Attachment C.

A handwritten signature in black ink, appearing to read "Thomas T. Ueno", written in a cursive style.

Thomas T. Ueno, CPA

ATTACHMENT A

Opinions

Summary

The reasonable license fee for the use of Berry's freight control system and the gross margin that Fleming earned with the unauthorized use of Berry's freight control system, based on my analysis of the information provided to me, are as follows.

- A reasonable license fee for Fleming's use of Berry's freight control system is **\$1,772** per container. The unpaid license fee from the date Atlantic Pacific International, Inc. (API) sold some of its assets to Fleming Companies Inc. (Fleming) to the date of this report is as follows.

Weekly Number of Containers	55	200	400	600
Unapid License Fee	\$ 27,706,486	\$ 100,750,857	\$ 201,501,714	\$ 302,252,571
4/1/03-8/23/03	\$ 2,004,891	\$ 7,290,514	\$ 14,581,029	\$ 21,871,543
8/24/03-3/21/05	\$ 8,005,643	\$ 29,111,429	\$ 58,222,857	\$ 87,334,286

- The estimated gross margin that Fleming realized from the date it no longer had authorized use of Mr. Berry's system to the date of this report is **\$269 million** based on C&S' pro forma revenues less the industry average cost of goods sold of 83 percent¹.

Estimated Sales (January 10, 2000 - March 21, 2005)	\$ 1,583,411,324
Cost of Sales (industry average 83%)	1,314,231,399
Gross Margin	<u>\$ 269,179,925</u>

Gross Margin (4/1/03-8/23/03)	\$ 20,771,526
Gross Margin (8/24/03-5/21/05)	\$ 85,341,148

Background

Wayne Berry is an independent software developer who in 1993 began developing a freight control system in response to some interest expressed by the two ocean carriers serving Hawaii - Matson Navigation and SeaLand Service, Inc. Mr. Berry created a demonstration version of his freight control system.

¹ I am still awaiting data such as separate revenue and costs related solely Fleming Logistics and C&S Logistics and the number of containers currently (and since January 10, 2000, being processed through the Berry Freight Control System).

About a year later, Jack Borja told Mr. Berry that he believed his freight company's, Atlantic Pacific International, Inc. (API), operations could benefit from automation. API was a principal freight consolidator for Fleming in Hawaii.

Mr. Berry did a business system analysis of API and agreed to automate selected processes for API. Mr. Berry used the freight control system that he earlier developed as the basis for this freight control system for API. Mr. Berry researched the market and found no other software that performed all the functions that API needed.

Jack Borja engaged Mr. Berry to install his freight control system for API's use. Mr. Berry developed such a system, retained ownership of the software, and allowed API to use it. The terms and conditions for his development of this software with API are specifically outlined in his invoice to API dated November 27, 1995.² He invoiced API \$2,000,000 for his work and stated in his agreement that Mr. Berry retains all rights to intellectual property created within the scope of this project. That scope was to develop software applications for:

- Freight/Logistics/ocean container shipping
- Purchase orders
- Bookings
- Tracking
- Auditing
- Accounts receivable
- Accounts payable
- Claims
- Scheduling

A central component of Mr. Berry's Freight Control System of an MS Access database designed to handle multiple purchase orders that are common in ocean freight consolidation in the consumer packaged goods market. Mr. Berry informed us that his freight control system has dependably handled over 50% of all food and consumer products shipped into Hawaii for over nine years.

Mr. Berry registered his freight control system with the United States Copyright Office on October 19, 1999.

API's key customer was Fleming Companies, Inc. (Fleming). On October 29, 1999, Mr. Berry licensed his freight control system to Fleming Foods, Inc. The license agreement set forth that all title and intellectual property rights in and to the freight control system software including database designs, report designs, custom code, functional designs, images, photographs, animations, video, audio, music, text, and 'applets' incorporated into the software are owned by Mr. Berry.³

² Wayne Berry's invoice to API for \$2,000,000, dated 11/27/95, #2727 (backdated)

³ End-User License Agreement between Fleming Foods, Inc. and Wayne Berry dated October 29, 1999. HF 00252 - HF 00256

On October 9, 1999, just prior to Mr. Berry's licensing his system to Fleming, Fleming purchased some of the assets of API and discontinued using API as a freight consolidator. Thereafter, Fleming used Berry's freight control system and continues to use the system.

Fleming selected Manugistics Group's retail solution in August 23, 1999⁴ apparently to replace its dependence on Berry's freight control system. Fleming planned to pilot the system in December 1999 and implement it by January 10, 2000. The Hawaii Division was excluded from the January 10, 2000 implementation. I assumed that Fleming's continuing copyright infringement⁵ would encourage its management to convert its Hawaii Division earlier or very soon thereafter.

On March 6, 2003, a jury found for Mr. Berry on ownership of the three software components of his freight control system. It found that Fleming's making derivative copies of Berry's freight control system infringed on Mr. Berry's copyright. On April 1, 2003, and just prior to the Court's ruling on Mr. Berry's Motion for Permanent injunction, Fleming filed its voluntary Chapter 11 petition.

In 2003, C&S Wholesale Grocers, Inc. acquired Fleming Companies, Inc. In February 2004, Fleming and C&S produced a CD Rom disk that contained a record of the files that Fleming sold to C&S. Mr. Berry analyzed the CD Rom disk and found that among the files remaining on Fleming's and/or C&S' computers were 16 copies of Mr. Berry's copyrighted work that had been transferred to C&S.

Damages

A copyright is an intangible asset or an asset that does not have physical substance, that grants rights and privileges to a business owner, and that are inseparable from the enterprise. The law protects the owner of intellectual property from the unauthorized exploitation of it by others. A business enterprise that owns intellectual property can either internally utilize its benefits or transfer interests in the property to others.

Mr. Berry copyrighted his freight control system software. Computer software as defined by Revenue Procedure 69-21 (1969-2 CB 303) includes those programs or routines used to cause a computer to perform a desired task or set of tasks, and the documentation required to describe and maintain those programs. Computer programs of all classes, for example, operating systems, executive systems, monitors, compilers and translators, assembly routines, and utility programs as well as applications programs are included.

The Copyright Act (17 U.S.C. Sect. 101) defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." That set of statements or instructions was Berry's freight control system and the result was a successful logistics operation that contributed, among other things, sales and savings to the company.

⁴ Manugistics News & Events Detail web site

⁵ Ralph Stussi's memorandum to Wayne Berry dated November 24, 1999, Exhibit 50, A00431 and A00432

Freight Control System Cornerstone

Berry's freight control system became a cornerstone of Fleming's logistics business in Hawaii. It became an essential foundation block of Fleming's operations without which Fleming would be unable to handle the increased volume of containers. Mark Dillon of Fleming (and C&S) stated it would be impossible for Fleming to operate without it:

Q: Is it fair to say, sir, if you're ordered to stop using the spreadsheets, that running the logistics operation out of Kapolei would become much more difficult?

A: Much more --

Q: Difficult. Difficult, sir.

A: I'd say impossible. But, yeah, I can't conceive of it. I don't know how we would carry on.

Fleming was unable to find an off-the-shelf replacement system to replace Berry's freight control system nor was it able to custom develop one. Other typical cornerstones of businesses are management and key personnel and financing. A company will be severely handicapped or be forced to cease operations without any one of these cornerstones. The absence of any one would result in a company's demise.

License Fee

I computed below a reasonable license fee for the use of Berry's copyrighted freight control system. I used two methods to compute the fee. The first is based on the value of the assets that Fleming gave for the use of the freight control system. The second is based on estimated profits that Fleming realized by its continued unauthorized use of Berry's freight control system.

Fleming Acknowledged Fee

My analysis of API's records for 1999 shows that Fleming determined that the license fee for the use of Berry's Freight Control System was about \$1,772 per container processed.

I estimated the license fee that Fleming would pay for the use of the Freight Control System by analyzing the consideration given up by Fleming to API (and Borja) that is documented in the agreements covering API's sale of its assets to Fleming and the Settlement and Release Agreement between API, Borja, Fleming and other related parties for the use of the software. In addition to the sales price for its assets, API and Borja received additional consideration from Fleming by which Fleming released and discharged API and the Borjas from any and all claims, obligations, etc. that Fleming had.⁶ This would include its note for \$1,295,000.

⁶ Settlement and Release Agreement dated October 7, 1999 between API, A&A Consolidators, Borjas, and Fleming, p 4. Exhibit 218

Our review of documents and discussions with W. Berry disclose that Fleming gave additional consideration during its purchase of API's assets of about \$1.3 million. The net proceeds from the sale of the Cudahy property (after payment of the mortgage loan and expenses of the sale) was insufficient to pay the approximately \$80,000 that Fleming paid to truckers and jobbers for API, API's open account balance of \$295,607.67 to Fleming, and API's \$1,295,000 note to Fleming. Jack Borja testified that he owed \$1.2 million to Fleming at that time.⁷ W. Berry recalled that the net sale proceeds were less than \$300,000. None of the sales proceeds were available to pay down the Fleming note.

The additional consideration of \$1.3 million was for use of Berry's Freight Control System. However, it was given to Borja instead of Berry; and Fleming knew that Berry held the copyright to his freight control system and the license fee was due to him. Fleming paid \$60,288 for specific assets it purchased from API.⁸ Fleming knew that Berry's Freight Control System was not an asset that API sold as acknowledged in a memorandum from Ralph Stussi to Wayne Berry in which Mr. Stussi states "We understand that this product is licensed, not sold and that all title and intellectual property rights in and to the software product and any copies we make are owned by you."⁹

Fleming needed to use Berry's Freight Control System after its purchase of API's assets, until it was able to bring up its replacement system, the Manugistics system.¹⁰ It planned to implement the Manugistics system on January 10, 2000.¹¹ Fleming gave the \$1.3 million of additional consideration for its use of Berry's Freight Control System from the date of the sale of assets on October 9, 1999 to the expected date (January 10, 2000) that Fleming would no longer use the Freight Control System. Jack Borja stated that after the asset sale that he went to Mr. Berry and asked him to grant Fleming whatever license there is for them to use the system.¹²

As the custodian of records of API, Wayne Berry provided me a report of containers that were handled by API for Fleming during the period 11/15/95 through 10/9/99 (there were containers which landed through the end of 10/99 however; the API sale of assets was completed on 10/9/99). According to the report, API was responsible for 11,681 Fleming containers. There are 203 weeks during that period. I divided the 11,681 containers per week by 203 weeks per period to arrive at an estimate of 57 containers per week processed by API.

Between 1/1/99 and 10/9/99 (40 weeks), API processed 13,834 containers for Fleming. I divided 13,834 by 40 to arrive at an estimate of 55 containers per week.

⁷ Testimony of Jack Borja in Civil No. 01-00446SPK-LEK, March 4, 2003, pg 45

⁸ Asset Purchase Agreement dated October 9, 1999 between API and Fleming, Schedule 1

⁹ Memo for Ralph Stussi to Wayne Berry dated November 24, 1999 (A00432), pg 1

¹⁰ Memo for Ralph Stussi to Wayne Berry dated November 24, 1999 (A00432), pg 2

¹¹ Email from Dave Badten of Fleming to Mark D of Fleming dated November 19, 1999. Exhibit 14

¹² Testimony of Jack Borja in Civil No. 01-00446SPK-LEK, March 4, 2003, pg 23.

The above information yields a license fee on a per container basis of \$1,772 per container. I calculated this fee by dividing the \$1.3 million by the number of containers that Fleming expected to process during the period October 9, 1999 to January 10, 2000.

Consideration for use of Freight Control System	\$ 1,295,000
Estimated Number of Containers Processed Per Week in 1999	55
# of Weeks - 10/9/99 - 1/10/00	13.3
Estimated Number of Containers Processed in Period	731
License Fee Per Container	\$ 1,772

The total license fees accrued as a result of the unauthorized use of Berry's freight control system is calculated by multiplying the license fee per container of \$1,772 by the number of containers that Fleming processed in Hawaii from the date it acquired certain assets of API (October 9, 1999) to the date of this report (March 21, 2005). I made the following estimates of license fees due to Mr. Berry based on varying numbers of containers processed per week. For example, 55 containers per week would be low estimate because it assumes Fleming had no growth in its number of containers processed. I presented below the unpaid license fees due given certain average numbers of containers processed per week. The documents show that the number of containers processed per week varied from 150 to 600.

Weekly Number of Containers	55	200	400	600
Unapid License Fee	\$ 27,706,486	\$ 100,750,857	\$ 201,501,714	\$ 302,252,571
4/1/03-8/23/03	\$ 2,004,891	\$ 7,290,514	\$ 14,581,029	\$ 21,871,543
8/24/03-3/21/05	\$ 8,005,643	\$ 29,111,429	\$ 58,222,857	\$ 87,334,286

Net Sales and Gross Profits

Berry's freight control system is comprised of integrated purchasing system, freight system, specialized freight billing system, and numerous other subsystems such as truck GPS reporting, detention and demurrage – equipment tracking, EDI, synthetic loan planning and bar coding. The system optimizes transportation operations by managing the numerous detailed requirements and rules of the transportation and freight handling business. The system enabled Fleming to handle, with fewer staff and greater accuracy, a huge increase in the number of containers while at the same time improving customer satisfaction.

The system optimizes inbound transportation in terms of volumes and tariffs. Such optimization is achieved by system features such as maximizing container utilization and improved scheduling of consolidation deliveries. Jeff Hull, spokesman for Matson, says that shippers with a greater mix of commodities shipped could realize savings in tariffs

paid. He also stated that increasing the volume of containers handled could perhaps result in lower operating costs.¹³

The system enables the user to achieve other efficiencies such as the automated reconciliation of receiving documents with invoices and claims. The system also audits all freight bills thereby eliminating overpayments. The EDI features not only impact cash flows but also enable better inventory management and reduced inventory levels. The inventory labeling and tracking systems tracks the movement of all inventory thereby reducing loss and allows management to pin point problem areas.

Methodology

I have not been provided with sales data for either Fleming or C&S. As such, I prepared estimates of gross profits based on the following information and assumptions. Profits are often defined to be revenues minus costs. It is the value of each output and input at its market price even if it is not sold on a market.

Estimate Using C&S Court Filings And Industry Averages

C&S entered as Exhibit B¹⁴ a pro forma income statement. The statement identifies C&S Logistics Hawaii, LLC as having net sales of \$309,706,165 for the year ended August 16, 2004. By applying the industry average gross profit of 17 percent¹⁵, I estimated the gross profit was \$52,650,048. I indexed that amount for the other years between 2000 to the date of the report to determine the total gross profits realized by Fleming (and C&S), of \$269,179,925.

Estimate Using C&S Court Filings

I based this calculation on the pro forma income statement mentioned above. Net sales and the indexing methodology remains the same. The distinction with this calculation is that the C&S pro forma lists gross profit as 7.21 percent of net sales leading to a gross profit of \$22,329,814 for the year ended August 16, 2004. I indexed that amount for the other years between 2000 to the date of the report to determine the total gross profits realized by Fleming (and C&S), of \$114,163,956.

The difference in the above gross margins arises from the use of actual data versus pro forma or projection data and the use of only pro forma data. These differences provided the following range of values.

¹³ "Cold cargo shipper fortifies larger forwarder", American City Business Journals Inc., 1997

¹⁴ Reply of C&S Acquisition LLC and Certain of its Affiliates to Objections Based on Adequate Assurance

¹⁵ Ratio Books, Robert Morris

<u>Methodology</u>	<u>Annual Gross Margins</u>	<u>NPV 10 Years, 21%</u>
Pro forma statement and industry averages	\$ 52,650,048	\$ 225,698,106
Pro forma statement and pro forma margins	\$ 22,329,814	\$ 95,722,550

The above chart shows the net present value of the annual gross margins to be achieved by the company over the next ten years, using a 21 percent discount rate.

I calculated the gross margin Fleming earned when it used this cornerstone freight control system from the date it acquired certain assets of API to the date of this report. I used the pro forma statement and industry averages assuming that Fleming's pro formas are its best projections. I used the industry average cost of goods sold because Fleming was a large and growing food wholesaler and probably helped make these averages. I computed the gross margin by calculating sales for the period assuming no increase in sales and deducting cost of sales of 83 percent of sales.

Gross Margins Post Petition and Sale

Fleming filed for bankruptcy protection on 4/1/03 and was sold to C&S on 8/23/03. I have computed the amounts from the bankruptcy filing to the date of the sale and also from the date of the sale to the date of the report.

	<u>Industry averages</u>	<u>Pro forma margins</u>
Post petition (4/1/03-8/23/03)	\$ 20,771,526	\$ 8,809,571
Post sale to C&S (8/23/03-3/21/05)	\$ 85,341,148	\$ 36,194,687

Savings Realized

Gross margin and profits are a function of the specific savings resulting from the use of Berry's freight control system. Savings reduce expenses such as cost of goods sold and operating expenses. Reduced cost of goods sold increases gross margins and reduced operating expenses increases operating income and profits.

Fleming's use of Berry's freight control system resulted in savings throughout Fleming. As discussed above, the savings are not limited to logistics but also to other segments of the operations.

Listed below are some of the identified areas of savings.

- Personnel savings – reduced number of personnel to do the freight control. Employees could process more containers in the same period of time. Prior to the implementation of the system, approximately 20 people were needed to process 20 containers a week. With the freight control system, 14 people were processing at least 55 containers a week. Manual processing limits growth because of the difficulty

of coordinating and integrating the numerous rules and transactions in freight processing.

- Improved container utilization means lower freight cost. Mr. Berry estimates that prior to the use of his freight control system, Fleming container fill rate was about 70 percent. With the use of his freight control system, Fleming was able to achieve fill rates as high as 90 percent (a 28 percent improvement). Improved container utilization results from the use of such system features as order tracking and waypoint receiving
- Lower tariffs through an improved mix of commodities in a container.
- Reduced inventory levels through the use of such features as EDI, transportation planning, loading plans, and scheduling.
- Improved cash flow through more accurate reconciliation of receiving reports with invoices and claims and EDI. All freight bills are audited.
- Improved utilization of equipment.
- Ability to take advantage of shipping allowances. Mr. Berry informed me that Fleming prior to 1995 would have vendors deliver product to Fleming's warehouse in Hawaii. After implementation of API and the system, Fleming was able to take control of goods on the U.S. mainland, and take advantage of the shipping allowances offered by vendors. Even though Fleming now had the added transportation cost, the net effect was a lower product cost.

I must first identify all of the savings that Fleming realized in order to estimate the total savings Fleming realized from its unauthorized use of Berry's freight control system. The above list of savings is not all inclusive and is intended to convey the pervasive application of Berry's freight control system on Fleming. A macro measure of such savings was estimated by Mr. Berry.

I analyzed Mr. Berry's Damage Model¹⁶ and determined that based on the other information reviewed, it reasonably estimates the savings realized by Fleming. The damage model is based on reports produced by the Freight Control System for containers shipped for Fleming between 1995 and 1999. During that time period, API oversaw 11,681 containers for Fleming. API's gross profit was based on a simple formula, cost of Fleming to have product shipped themselves minus what the cost to have API organize the shipping divided by two (a 50/50 split between API and Fleming).¹⁷

According to the Sales and Allowance Report, API had \$40,556,931 in sales, or \$3,472 per container. Also according to that report, Fleming was able to take \$9,106,128 in shipping allowances (\$779 per container). Those containers cost \$28,491,500 to ship (\$2,509 per container).¹⁸

¹⁶ "Summary of Voluminous Records Contained in Disclosure A00519"

¹⁷ Currently Fleming is able to keep all savings.

¹⁸ Mr. Berry's model shows \$2,439 per container. Mr. Berry took an average based on 11,681 containers. When I reviewed the Container Costs Report, there were only 11,380 containers listed, my average container price is derived by dividing \$28,491,550 by 11,380 not 11,681.

Additional costs totaling \$571,878 (\$48.96 per container) were found in the Job Costs Report. I added total sales and allowances and subtracted from that container costs and job costs to determine an average savings of \$1,699 per container (\$920 in shipping and \$779 in allowances). The table below outlines the savings realized by Fleming from January 10, 2000 until the date of this report and an estimate of continued use for the next 10 years. I also included savings post petition to date of the sale to C&S, and from the date of the sale to the date of the report.

	<u>55 per week</u>		<u>200 per week</u>		<u>400 per week</u>		<u>600 per week</u>	
Past (1/1/00- 3/21/05)	\$	25,243,581	\$	91,794,839	\$	183,589,678	\$	275,384,517
Future- 10 years	\$	19,415,784	\$	190,579,257	\$	381,158,514	\$	571,737,771
4/1/03-8/23/03	\$	1,922,303	\$	6,990,194	\$	13,980,388	\$	20,970,582
8/23/03-3/21/05	\$	7,675,864	\$	27,912,233	\$	55,824,466	\$	83,736,699

Exhibit 1

Gross Profits

<u>Income Data</u>	<u>C&S proforma industry average</u>	<u>Using C&S Proforma</u>
Net Sales	100.00%	100.00%
Gross Profit	17.00%	7.21%
Operating Expenses	15.40%	6.54%
Operating Profit	1.60%	0.67%

Net Sales	309,706,165	309,706,165
Gross Profit/year (2003)	52,650,048	22,329,814

2000 Start of Unlicensed Use	1/10/2000
2000 Period End	12/31/2000
2005 Period Start	1/1/2005
2005 Date of Report	3/21/2005
2005 Period End	12/31/2005

Indexed Gross Profits- Past

<u>Period Start</u>	<u>Period End</u>	<u>C&S proforma industry average</u>	<u>Using C&S Proforma</u>
1/10/2000	12/31/2000	47,739,911	20,247,339
1/1/2001	12/31/2001	50,564,896	21,445,465
1/1/2002	12/31/2002	51,491,747	21,838,559
1/1/2003	12/31/2003	52,650,048	22,329,814
1/1/2004	12/31/2004	54,440,150	23,089,028
1/1/2005	3/21/2005	12,293,173	5,213,752
Total Past Gross profits		269,179,925	114,163,956
4/1/2003	8/23/2003	20,771,526	8,809,571
8/24/2003	12/31/2003	18,607,825	7,891,907
1/1/2004	12/31/2004	54,440,150	23,089,028
1/1/2005	3/21/2005	12,293,173	5,213,752
		85,341,148	36,194,687

Total Sales	1,583,411,322	1,583,411,322
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Gross Profits - Future

3/22/2005	12/31/2005	44,193,180	18,743,108
4/1/2006	12/31/2006	56,486,354	23,956,859
4/1/2007	12/31/2007	56,486,354	23,956,859
4/1/2008	12/31/2008	56,486,354	23,956,859
4/1/2009	12/31/2009	56,486,354	23,956,859
4/1/2010	12/31/2010	56,486,354	23,956,859
4/1/2011	12/31/2011	56,486,354	23,956,859
4/1/2012	12/31/2012	56,486,354	23,956,859
4/1/2013	12/31/2013	56,486,354	23,956,859
4/1/2014	12/31/2014	56,486,354	23,956,859
4/1/2015	12/31/2015	56,486,354	23,956,859
Total		609,056,716	258,311,701
NPV		225,698,106	95,722,550

Exhibit 2
Savings

Amount	Number of Containers based on	Per Container
40,556,931	11,681	3,472.04
API Sales		
Fleming Allowance	11,681	779.57
Container Cost	11,380	2,503.65
Job Costs	11,681	48.96
Container Count (95-99)		

Savings	
Fleming Allowance	780
API Sales	3,472
Less: Container Cost	2,504
Less: Job Cost	49
Savings per Container	1,699

Past Savings

Period Start	Period End	Weeks in Period	Savings per container	Total \$5 per week	Total 200 per week	Total 400 per week	Total 600 per week
1/1/2000	12/31/2000	51	1,699	4,739,012	17,232,770	34,465,540	51,698,310
1/1/2001	12/31/2001	52	1,699	4,859,156	17,669,657	35,339,314	53,008,971
1/1/2002	12/31/2002	52	1,699	4,859,156	17,669,657	35,339,314	53,008,971
1/1/2003	12/31/2003	52	1,699	4,859,156	17,669,657	35,339,314	53,008,971
1/1/2004	12/31/2004	52	1,699	4,872,505	17,718,200	35,436,400	53,154,600
1/1/2005	3/21/2005	11	1,699	1,054,597	3,834,898	7,669,796	11,504,694
		270		25,243,581	91,794,839	183,589,678	275,384,517
4/1/2003	8/23/2003	21	1,699	1,922,303	6,990,194	13,980,388	20,970,582
8/24/2003	3/21/2005	82	1,699	7,675,864	27,912,233	55,824,466	83,736,699

Future Savings

Period Start	Period End	Weeks in Period	Savings per container	Total \$5 per week	Total 200 per week	Total 400 per week	Total 600 per week
3/22/2005	12/31/2005	41	1,699	3,791,197	13,786,171	27,572,343	41,358,514
1/1/2006	12/31/2006	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2007	12/31/2007	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2008	12/31/2008	52	1,699	4,872,489	17,718,143	35,436,286	53,154,429
1/1/2009	12/31/2009	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2010	12/31/2010	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2011	12/31/2011	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2012	12/31/2012	52	1,699	4,872,489	17,718,143	35,436,286	53,154,429
1/1/2013	12/31/2013	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2014	12/31/2014	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
1/1/2015	12/31/2015	52	1,699	4,859,140	17,669,600	35,339,200	53,008,800
				52,409,296	190,579,257	381,158,514	571,737,771
				19,415,784	190,579,257	381,158,514	571,737,771

NPV

Exhibit 3
Discount Rate

Discount rate (Build-up method)

Risk free rate	5% Long-term (20-year) U.S. Treasury Coupon Bonds Yield	
Equity risk premium	8% a	
Industry risk premium	-2.14% b	
Risk premium for size	9.15% c	(*) If you see business as a nation, this number will be reduced.
Unsystematic risk	1% d	(*) If you see business as a nation, this number will be reduced.
NCF Discount rate	<u>21.01%</u>	

Source

- a: SBBi Valuation Edition 2002 Yearbook, Stock Market Return and Equity Risk Premium Over Time, P.77
b: SBBi Valuation Edition 2002 Yearbook, Industry Premia Estimates, P.46
c: SBBi Valuation Edition 2002 Yearbook, Long-Term Returns in Excess of CAPM Estimation for Decile Portfolios of the NYSE/AMEX/NASDAQ, P.133
d: Assuming that business is limited in Hawaii.

Condition

Hawaii sales: \$300 million / year

EX 4
Food Inflation Rate

Commodities - Food

Year	Percent Change
1939	-2.5%
1940	1.7%
1941	9.2%
1942	17.6%
1943	11.0%
1944	-1.2%
1945	2.4%
1946	14.5%
1947	21.7%
1948	8.3%
1949	-4.2%
1950	1.6%
1951	11.0%
1952	1.8%
1953	-1.4%
1954	-0.4%
1955	-1.4%
1956	0.7%
1957	3.2%
1958	4.5%
1959	-1.7%
1960	1.0%
1961	1.3%
1962	0.7%
1963	1.6%
1964	1.3%
1965	2.2%
1966	5.0%
1967	0.9%
1968	3.5%
1969	5.1%
1970	5.7%
1971	3.1%
1972	4.2%
1973	14.5%
1974	14.3%
1975	8.5%
1976	3.0%
1977	6.3%
1978	9.9%
1979	11.0%
1980	8.6%
1981	7.8%
1982	4.1%
1983	2.1%
1984	3.8%
1985	2.3%
1986	3.2%
1987	4.1%
1988	4.1%
1989	5.8%
1990	5.8%
1991	2.9%
1992	1.2%
1993	2.2%
1994	2.4%
1995	2.8%
1996	3.3%
1997	2.6%
1998	2.2%
1999	2.1%
2000	2.3%
2001	3.2%
2002	1.8%
2003	2.2%
2004	3.4%
Average inc	<u>4.33%</u>

ATTACHMENT A-1
Information Considered

- Asset Purchase Agreement dated October 9, 1999 between API and Fleming
- Settlement and Release Agreement among API, A&A Consolidators, Inc., Jack and Heidi Borja, and Fleming made on October 7, 1999.
- Memorandum from Ralph Stussi to Wayne Berry, License agreement for freight control system, dated November 24, 1999
- Email from Dave Badten to MarkD re: edi transmission to Fleming Hawaii logistics, dated November 19, 1999
- Transcript of Proceedings in the Wayne Berry vs. Fleming Companies, Inc., et al.
- Descriptions of the Berry Freight Control System
- Discussions with Wayne Berry
- Crystal Reports, Job Costs
- Crystal Reports, Container Costs
- Crystal Reports, Sales
- SBBI Valuation Edition 2002 Yearbook
- Economic Report of the President 2005
- Testimony of Mark Dillon, September 28, 2004
- Wayne Berry's invoice to API for \$2,000,000, dated 11/27/95
- "Summary of Voluminous Records Contained in Disclosure A00519"
- Robert Morris Ratio Books

Exhibit 5

License Fee

License Fee per Container		1772					
Period Begin	Period End	Number of Weeks in Period	Per Container	Containers per week			
4/1/2003	8/23/2003	21	1,772	200	400	21,871,543	600
8/24/2003	3/2/2005	82	1,772	7,290,514	14,581,029	21,871,543	
				29,111,429	58,222,857	87,334,286	

Exhibit 6

Containers per week

Total Containers (95-99)	11,681
Period Start	11/15/1995
Period End	10/9/1999
Number of weeks in period	203
Containers per week	57

1999 Calculations

1999 starts with container #	13,834
1999 containers	2,212
Period Start	1/1/1999
Period End	10/9/1999
Number of weeks in period	40
Containers per week	55

ATTACHMENT B**Resume****Thomas T. Ueno**

Mr. Ueno, principal of Thomas T. Ueno CPA, is a Certified Public Accountant and a Certified Forensic Accountant. He is a management consultant who provides litigation support services to attorneys in Hawaii and the mainland. He knows how to analyze and scrutinize financial statements, audit reports, tax returns and financial reports because of his audit, business management, and litigation support experience and professional accounting training.

Mr. Ueno understands the legal process and has served as an expert witness since 1981. He has testified in depositions and in court. He has worked with plaintiffs' and defendants' attorneys on commercial litigation and on personal injury matters. For example, he worked on several insurance defense cases involving professional malpractice, business interruption and destruction, and loss of future employment income. He has served as mediator and arbitrator for assignments from the American Arbitration Association.

Mr. Ueno understands the management and financial challenges of running a business and can quickly assess and detect improprieties by drawing on his 25 years of management consulting experience. He analyzes businesses and works with owners in developing their business plans for growth and success. He helps turn around ailing businesses. He analyzes economic information and relates its potential impact to a business. He has worked on several matters involving resort rentals and timeshare and related tourism activities.

Knowledge of the industry is key to doing sound financial and business analysis. Over the past 25 years, Mr. Ueno gained a breadth of experience with key industries in Hawaii including government, not-for-profits, health care, hotels, retail and wholesale, legal and other professional services, real estate development, agriculture, restaurants, and travel and hospitality.

Descriptions of some of Mr. Ueno's relevant litigation support experiences are as follows:

- Asset Finding - Detail tracing of cash from billings to collections and payments. Analyzed aging reports, shareholder loan transactions, and capital transactions. Reviewed loan applications and documents. Tracked the flows of cash received and disbursed for certain officers. Traced inter-company transfers, payments of personal expenses, and deposits to personal bank accounts. Reviewed bank reconciliations and agreed deposits and withdrawals with the accounting records.
- Loss Analysis - Computed the business losses incurred by the client as a result of the alleged incident such as a failed computer system. Conducted a

detailed analysis of the client's business. Analyzed historical financial statements (including income tax returns) and related books and records and measured the loss of revenues, estimated the related direct expenses, and determined the resulting impact on its net income and cash flows.

- Lost Profits Analysis - Conducted a detailed analysis of the company's historical financial performance; assessed its financial, management, and other resources; reviewed business plans; and estimated the company's projected revenues, direct costs, and gross margins. Reviewed and analyzed the company's historical cash flows and the assumptions for its cash flow projections. Analyzed direct expenses to determine the expenses directly related to the generation of projected revenues. Calculated the present value of the future lost profits and calculated the interest on lost profits incurred for the period from the date of the incident to the trial date.
- Reconstruction of Financial Records - Developed complete sets of receipts and disbursement journals, general ledgers, and financial statements from available documents. Prepared comparative financial statements and tax return information to show historical trends. Identified missing records through reconciliation with external records such as bank statements, loan applications, and tax returns.
- Business Valuations - Estimated the fair market value of businesses based on our review of their historical financial performance, review of their business plans, review of assets and liabilities, assessment of the contingent liabilities, review of management, and analysis of the future economic trends. Used valuation methods such as the discounted cash flow, present value of projected earnings, and net asset value.
- Internal Control Review - Reviewed the internal controls in a company to identify specific areas of weaknesses that may contribute losses from the alleged incident. Mapped the flow of key document handling and approvals to identify the key people. Ascertained that the auditors properly followed generally accepted auditing standards in communicating material weaknesses and other internal control issues to the client.
- Adherence to Generally Accepted Accounted Principles - Reviewed the financial statements to ensure that they are presented in accordance with GAAP and that the proper disclosures are made, such as accrued liabilities and the notes to the financial statements.

Mr. Ueno has provided litigation support services since 1981. He has been qualified in federal, circuit, and family courts as an expert witness. Mr. Ueno is a Diplomat of American College of Forensic Examiners (ACFE).

Prior to starting his own firm, Mr. Ueno was the partner-in-charge of Grant Thornton's management consulting department in Honolulu where he directed the firm's litigation support practice and served as an expert witness and consultant. He served as the firm's liaison for its management consulting operations with the Grant Thornton International Asia-Pacific operations. He also served on the firm's national government services committee.

Mr. Ueno earned his BBA in accounting and his MBA from the University of Hawaii. He served on the strategic planning and visioning committees of the American Institute of Certified Public Accountants and is the past president of the Hawaii Society of CPAs. He served as a member of council of the AICPA. He is a charter member of the AICPA's Group of 100, a prestigious cross functional group of nationally prominent, forward-thinking CPAs.

Attachment C
Other Testimony

The following are the matters on which I provided a report/and or deposition testimony within the last four years.

<u>Case</u>	<u>Number & Venue</u>
Abaya v Mantell	State of Hawaii, First Circuit Court
Alan Park v. GEICO, et al	Civil No 02-1-1093-05 RWP; State of Hawaii, First Circuit Court
Allen Guastavino v Watkins-Johnson Company	CV 788289; Superior Court CA, Santa Clara
AOAO The Twin Towers v Fidelity Management Inc	Civil No 01-1-1948-06 (EEH); State of Hawaii, First Circuit Court
Bar-B-Q & Things, Jaron's Restaurant & Zia's Café v. C&C of Honolulu	Civil No 00-1-2547-08; State of Hawaii, First Circuit Court
California Discount Tire; Maui Carpet & Drapery; Russ' California Discount Carlson	Civil No. 99-0014 DAE ; US District Court, District of Hawaii
City Bank v UBS Paine Webber, Inc and Christina M. Li	Civil No. 01-00827 SOM-LEK; State of Hawaii, First Circuit Court
Commercial Truck & Lift Center, Inc.	Civil No. 00-1-3152-10; State of Hawaii, First Circuit Court
Danny Lowrey v. Paul Takeda, et al	Civil No. 98-5257-12;
David Ashmore et al v Poipu Resort Partners et al	Civil No. 95-0136-01; State of Hawaii, First Circuit Court
David Kaplan v. Y-Bron Hawaii Incorporated dba Fantasy Restaurant and Evergreen Restaurant. Hoa an Nguyen, and Doe defendants	CV00-00386 SPK KSC; State of Hawaii, Second Circuit Court
Doran et al v Aus et al	Civil No. 01-1-0628(3); State of Hawaii, First Circuit Court
Dotson v Roscoe Moss Hawaii	Civil No. 99-2750-07; State of Hawaii, First Circuit Court
Easterday v. Fireman's Fund	Civil No. 98-5316-12EEH; State of Hawaii, First Circuit Court
Edward Au vs Hajalee, Inc. dba Highway Supermarket	Civil No. 02-1-1406-06; State of Hawaii, First Circuit Court
Finance Enterprises, Ltd. v. John Doe	;
Gilbert Wizman v. Star Market	Civil No. CV01-00113 SPK LEK; State of Hawaii, Second Circuit Court
Godinet v Godinet	Civil No. 02-1-0220 (K); State of Hawaii, First Circuit Court
Hawaii Helicopters Inc v. Helicopter Consultants of Maui Inc. et al	Civil No. 00-00185 HG FIY; State of Hawaii, Third Circuit Court
Hawaii Island Escrow et al v. Fagundes	Civil No.3C99-0-000289; State of Hawaii, Third Circuit Court
Hawaii Microfilm Services v. Shin	Civil No. 98-4315-10 (KNB); State of Hawaii, First Circuit Court
Hilo Fish Company Inc v Hawaii International Seafood	
Hilo Fish Company, Inc. vs American Insurance Agency, et.al.	
Hilton Hawaiian Village v. Kerr Pacific, et al.	

<u>Case</u>	<u>Number & Venue</u>
Himuro v. Nakamoto	Civil No. 99-1650-04; State of Hawaii, First Circuit Court
Ikeda v. Koichiro Ushirubo	Civil No. 98-4422-10; State of Hawaii, First Circuit Court
IKON Office Solutions v. Printer's Pride Inc	Civil No. 98-4269-09; State of Hawaii, First Circuit Court
Investors Equity Life Insurance Company of Hawaii Ltd. V Ernst & Young	
Jean Michael Pourny v. Miyake Concrete Accessories Inc	Civil No. 99-00265; State of Hawaii, Second Circuit Court
Jeffery Trinh v The Gap	Civil No. 378-AO-0290; State of Hawaii, First Circuit Court
Long & Melone, Ltd. vs. North Kona Development Corp.	Civil No. 97-00879; State of Hawaii Circuit Court, Third Circuit
Long & Melone, Ltd. vs. North Kona Development Corp.	No. 1CC92-0-002880; U.S. District Court, District of Hawaii
Loveland Academy LLC v Patricia Hamamoto, DOE, et al	Civil No. 02-00693; US District Court for District of Hawaii
Nobuaki Yamaguchi v. Y-S- (Hawaii) Inc., et al	Civil No. 98-3020-06; State of Hawaii Circuit Court, First Circuit
OCM Real Estate Opportunities Fund A, LP et al v Bill D. Mills et al	Civil No. 99-00781; State of Hawaii Circuit Court, First Circuit
OTM v. State of Hawaii, Department of Transportation	Civil No. 96-0404-01; State of Hawaii, First Circuit Court
Pancakes of Hawaii v. Sofos Realty Corp., et al	Civil No. 91-0856(2); State of Hawaii, Second Circuit Court
Ralph Callender, M.D. v. Kaanapali Beach Hotel, Ltd	Civil No. 2C99-0468(2); State of Hawaii, Second Circuit Court
Roy Lee Compton (minor) et al v American Honda Motor Company, Angello's All Terrain & Towing et al	CV 011149; Superior Court CA, San Luis Obispo
Roy Takatsuki, dba Roy Takatsuki Construction v. Association of Apartment Owners of Poipu Shores; Castle Resorts & Hotels, Inc. et al	Civil No. 00-01-0116; State of Hawaii, Fifth Circuit Court
Russell Toshio Yamane v O&Y Inc., et al	
Ruth Koga and Standard Sales vs Ikazaki et al.	No. 95-3573-10(VSM); State of Hawaii Circuit Court, First Circuit
Sasakura vs Aaron Yoo	CV02 00565 HG-KSC; US District Court for District of Hawaii
Sophonria Josselin vs Jean Marie Josselin	FC-D No. 00-1-1443; Family Court of the First Circuit, State of Hawaii
Spring Patents	
Stanford Carr Development Corp et al v Unity House Incorporated et al	CV 99-1781-05 VLC; State of Hawaii, First Circuit Court
Wayne C. Metcalf II as Liquidator of Investors Equity Life Insurance Company of Hawaii, Ltd. v. Ernst & Young	Civil No. 1CC96-0-1275; State of Hawaii Circuit Court, First Circuit
Wayne C. Metcalf, III v. Henry Akiu, Jr. et al. and Henry Akiu Jr. et al. v. Peter Po Sang Wong, et al. and Mark Hopkins v. Peter Po Sang Wong, et al.	Civil No. 97-5273-12; Civil No. 99-4504-12; State of Hawaii Circuit Court, First Circuit

<u>Case</u>	<u>Number & Venue</u>
Weaver v. Buck	Civil No. 01-1-00129; State of Hawaii Circuit Court, First Circuit
Whitey's Boat Cruises et al v. State of Hawaii	Civil No. 97-0139; State of Hawaii Circuit Court, First Circuit
Pancakes of Hawaii v. Sofos Realty Corp., et al	Civil No. 91-0856(2); State of Hawaii, Second Circuit Court
Ralph Callender, M.D. v. Kaanapali Beach Hotel, Ltd	Civil No. 2C99-0468(2); State of Hawaii, Second Circuit Court
Rearden vs. Lonnie Tiner, D.D.S.	
Roy Lee Compton (minor) et al v American Honda Motor Company, Angello's All Terrain & Towing et al	CV 011149; Superior Court CA, San Luis Obispo
Roy Takatsuki, dba Roy Takatsuki Construction v. Association of Apartment Owners of Poipu Shores; Castle Resorts & Hotels, Inc. et al	Civil No. 00-01-0116; State of Hawaii, Fifth Circuit Court
Russell Toshio Yamane v O&Y Inc., et al	
Ruth Koga and Standard Sales vs Ikazaki et al.	No. 95-3573-10(VSM); State of Hawaii Circuit Court, First Circuit
Sasakura vs Aaron Yoo	CV02 00565 HG-KSC; US District Court for District of Hawaii
Sato & Loui	
Scott Stuber vs. Fireman's Fund Insurance Company	S.P. No 98-0087; State of Hawaii, First Circuit Court
Sophonria Josselin vs Jean Marie Josselin	FC-D No. 00-1-1443; Family Court of the First Circuit, State of Hawaii
Spring Patents	
Stanford Carr Development Corp et al v Unity House Incorporated et al	CV 99-1781-05 VLC; State of Hawaii, First Circuit Court
Terrence Craig, et al. vs. Village Resorts, Inc.	
Valenciano v. Law Offices of Zenger	
Wayne C. Metcalf II as Liquidator of Investors Equity Life Insurance Company of Hawaii, Ltd. v. Ernst & Young	Civil No. 1CC96-0-1275; State of Hawaii Circuit Court, First Circuit
Wayne C. Metcalf, III v. Henry Akiu, Jr. et al. and Henry Akiu Jr. et al. v. Peter Po Sang Wong, et al. and Mark Hopkins v. Peter Po Sang Wong, et al.	Civil No. 97-5273-12; Civil No. 99-4504-12; State of Hawaii Circuit Court, First Circuit
Weaver v. Buck	Civil No. 01-1-00129; State of Hawaii Circuit Court, First Circuit
Whitey's Boat Cruises et al v. State of Hawaii	Civil No. 97-0139; State of Hawaii Circuit Court, First Circuit
WITKO, Inc. vs. Trustees of the Estate of Bernice Pauahi Bishop Estate, et.al.	Civil No. 97-1198-03; State of Hawaii Circuit Court, First Circuit
Y.K. Chow v. Myles Suehiro et al.	Civil No. 96-4458-10; State of Hawaii, First Circuit Court